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Remarks

The Examiner has required restriction under 35 U.S.C. §121 between Species I: Fig. 9A and Species II: Fig. 9B.

Applicant respectfully traverses the restriction and urges allowance of the pending claims.

Applicant submits this response to the restriction *with traverse*. If the restriction is not withdrawn, Applicant elects species I (Fig. 9A) and claims 1-11 and 13-44 readable thereon. However, the restriction is improper for the following reasons.

Referring to MPEP 806.05 (8th ed., rev. 3), restriction may be proper if the inventions as claimed are distinct, however, *restriction is never proper if the claimed inventions are not distinct*. The Office has failed to establish that the species are distinct as set forth by MPEP 806.05, and restriction is not proper. However, even if distinction is established, restriction is improper after previous examination of the claims on the merits under MPEP 808.02 (8th ed., rev. 3) and MPEP 803 (8th ed., rev. 3).

Applicant refers to MPEP 808.02 (8th ed., rev. 3) entitled Related Inventions which further discusses restriction under 806.05. It is stated in such MPEP section that even if restriction is proper under MPEP §806.05, the Examiner, in order to establish reasons for insisting upon restriction, must explain why there would be a serious burden if restriction is not required. The Examiner must show by appropriate explanation one of the following: (a) separate classification, (b) separate status in the art when they are classifiable together, or (c) a different field of search. It is further stated in MPEP 808.02 that where the classification is the same and field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist dividing among related inventions. The Office has failed to provide any explanation to support restriction in the present application contrary to MPEP 808.02.

In view of the following prosecution history of the present application up to this point, it is clear that restriction is not proper. More specifically, Applicant notes the *prosecution of the subject application wherein all pending claims subject to the*

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restriction have been searched and examined on the merits and rejected in the previous Office Action mailed May 18, 2005.

It has not been shown by an appropriate explanation that a serious burden exists if the claims are not restricted. The restriction requirement issued November 1, 2005 is entirely void of any evidence of the alleged species being separately classified, achieving separate status in the art when the species are classifiable together, or requiring a different field of search. Furthermore, *the original claims which were filed with the original application are pending and have already been examined.* Section B of MPEP 808.02 states that separate status in the art may be shown by citing patents which are evidence of such separate status, and also separate field of search. *No patents have been cited or other evidence offered to indicate separate status.* There is no indication that a different classification is provided or a different field of search is required. No clear indication of separate future classification and field of search is provided. *As mandated by MPEP 808.02, no reasons exists for dividing among related inventions.*

Applicant further contends that any restriction is improper for at least the following reasons.

First, the Office has apparently already searched and examined the pending claims which are now the subject of restriction. Accordingly, now requiring elimination of any set of claims will not reduce the scope of searching, and thus there are no efficiencies gained by imposing a restriction requirement. In addition, restriction at this late time is not timely, and does not have any sense of fairness to Applicant.

Restriction is not proper since there is increased burden on the U.S. Patent and Trademark Office, on the Applicant and ultimately on the public in prosecuting multiple separate patent applications. For Applicant, splitting the invention into multiple cases increases costs associated with government fees, prosecution fees, and maintenance fees for multiple patents. For the PTO, there are increased costs associated with conducting multiple searches in multiple applications and multiple examinations *for an invention that already has been searched and examined.* It further ultimately produces a burden on the pertinent public that will review Applicant's commonly patented technology. Such people will be compelled to

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unnecessarily review multiple issued patents and file histories.

Pursuant to MPEP 803 (8th ed., rev. 3), it is stated that *if the search and examination of all the claims in an application can be made without serious burden, the examiner must examine them on the merits, even though they include claims to independent or distinct inventions*. In view of the prior examination of the present application, Applicant respectfully submits no serious burden exists and Applicant respectfully requests withdrawal of the restriction requirement for this additional reason.

The Office has not established that the inventions are distinct under MPEP 806.05(c) and even if the inventions are distinct, restriction is not proper under MPEP 808.02 and MPEP 803 in view of the previous prosecution of the present application including previous *examination of the claims on the merits*.


For at least the above-mentioned compelling reasons, Applicant respectfully asserts that restriction is improper, and requests that the Examiner withdraw the restriction requirement and consider the already searched and examined pending claims in this application at this time.

The Examiner is requested to phone the undersigned if the Examiner believes such would facilitate prosecution of the present application. The undersigned is available for telephone consultation at any time during normal business hours (Pacific Time Zone).

Respectfully submitted,

Laurence Meade Hubby, Jr.

By:


James D. Shaurette
Reg. No. 39,833
Date: 12/1/05

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